

Curb, Channel and Coordinate: The Constitutionalisation of International Courts and Tribunals

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The growth in number and caseload of international courts and tribunals (ICs) over the last 35 years is striking. Consider: in 1980, only three of the nine ICs presented in this volume existed.¹ Some scholars link the surge to the fall of the Berlin Wall and the hopes of that event for a new international legal order. The contributions in this volume elaborate in fascinating ways both the potential and the pitfalls of this cascade of ICs.

They were set up to promote multifarious objectives, without much attention to the risks of fragmentation within and among them, their potential for ‘hollowing out’ the sovereignty of their creators, or the new risks they created.² No surprise that concerns have blossomed about the legitimacy of these ICs, singly and as a ‘global judiciary’ as they multiply, come of age and gain institutional interests and momentum. Jointly, they have become so powerful and autonomous that they cannot be reined in – nor explained nor assessed – simply as the creations of their masters. Yet many of them still appear unable to meet the – possibly unrealistic – aspirations of their creators and other ‘compliance communities’³.

From the vantage point of normative political philosophy the preceding chapters offer several lessons and further research questions of how to assess and promote the legitimacy of these ICs. The following comments identify some of these.

Section I identifies some of the hitherto understudied arenas where the authors remind us that the perceived legitimacy of the ICs matters if they are to secure their various objectives.

Section II addresses one central standard of legitimacy: the content of the

¹ ICJ (1945); ECJ (1952); ECtHR (1959, but became a permanent court only in 1998); Lebanon (2009); ICC (1998 (Statute adopted), 2002 (started functioning)); US-Iran Claims Tribunal (1981); ICTY (1993); ITLOS (1996); Appellate body of WTO (1995).

² A von Bogdandy and I Venzke ‘On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority’ (2013) 26 *Leiden Journal of International Law* 49-72 and A Follesdal and S Hix ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533-62.

³ X Dai, *International Institutions and National Policies* (Cambridge, Cambridge University Press, 2007) and K Alter, *The New Terrain of International Law: International Courts in International Politics* (Princeton New Jersey, Princeton University Press, 2013).

concept of the Rule of Law, which remains contested both as an objective of ICs, and as a requirement on their operation. I stipulate that two central underlying values justify several if not all rule of law norms: non-domination and stable legitimate expectations. Respect for human rights is a further substantive value which many but not all contributors include in the concept.

I then consider two main challenges to the legitimacy of ICs from rule of law standards. One is the possible fragmentation and the legal uncertainty that may ensue. Section III thus summarizes the chapters' insights about the alleged fragmentation wrought by so many ICs. Section IV considers some further challenges to the objectives and performance of ICs by these rule of law standards. Their multiple objectives require that the judges and arbitrators enjoy a wide berth of discretion in interpretation and adjudication – which raise the risk that states and individuals become subject to domination by the ICs themselves. Individuals may end up not living under the rule of law but under the rule of international lawyers.

The following two sections gather several possible strands of responses to these fears. Section V elaborates how the power of ICs is constrained by their complex interrelationship with domestic authorities. Some such interdependence may be assessed by a further popular standard of legitimacy in addition to the rule of law, namely *subsidiarity*. This concept is often invoked in international law, explicitly so for the European Union⁴ and in debates concerning the European Convention on Human Rights.⁵ The section explores how several features of the authority of ICs presented by the authors may be explained and perhaps assessed by some standard of subsidiarity, to reduce the risks wrought by the ICs themselves. Appeals to subsidiarity may not so much lay issues to rest as stimulate more structured and systematic arguments concerning the legitimacy of ICs. Section VI considers several ways to regulate the discretion of the ICs to reduce the risks of fragmentation and domination, garnered from the contributions of this volume. Establish more curbs on the international courts, and guide and coordinate them better. In short: increased legitimacy of international courts requires their constitutionalisation.

I. WHY LEGITIMACY MATTERS

How do the contributions in this volume elucidate questions about the legitimate authority of ICs? An influential tradition maintains that the core issue of legitimate authority is why a judgment by an IC gives other actors a reason to act differently than they would, even imposing on them a moral

⁴ *Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community* (Adopted 13 December 2007, in Force 1 December 2009) [2007] *Official Journal of the European Union* C306/1.

⁵ Council of Europe, *Protocol No 15 Amending the Convention on Fundamental Freedoms* 2013.

obligation to do so.⁶ When actors such as domestic courts regard an IC as a *legitimate* authority, they are *somewhat* more likely to comply or defer, be it because they are socialized to do so;⁷ or due to their ‘capacity to be moved for moral reasons’.⁸ Several scholars have noted that the range of actors possibly affected by ICs is wide: there are many important ‘compliance communities’ including domestic civil society and other ICs.⁹

Contributions in this volume remind us that much of the impact of ICs – intended or not – depends on compliance communities often overlooked, far beyond states who must decide to change their legislation or policies eg in response to the WTO dispute settlement system.¹⁰

If ITLOS, ECtHR and other ICs succeed in specifying legal norms¹¹ or in redefining concepts such as the ICTY’s definition of ‘joint criminal enterprise’ or gender based violence,¹² this is due to a wide range of private and public actors who accept the authority of these ICs in this regard. ICs that seek to bolster the domestic rule of law through training and capacity building must likewise do so not by sanctions but by voluntary acceptance by domestic audiences. Likewise, if ICs are to succeed in ambitious objectives such as *halting* crimes – as the UN Security Council sought with the ICTY¹³ – or to combat terrorism at large as is hoped with the STL¹⁴ – this requires the voluntary cooperation of local communities to generate public pressure on politicians at large – as well as regional actors and the international community at large.

In general, then, the manifold objectives of ICs force us to look very broadly to identify the important actors who must be convinced that the IC is indeed legitimate. This leads us to two further issues: what standards are relevant for such assessments of legitimacy, and what are the ‘functions’ or ‘objectives’ of ICs?

⁶ J Raz ‘The Problem of Authority: Revisiting the Service Conception’ (2006) 90 *Minnesota Law Review* 1003–44.

⁷ I Hurd, *After Anarchy. Legitimacy and Power in the United Nations Security Council* (Princeton, NJ, Princeton University Press, 2007).

⁸ A Buchanan and R O Keohane. ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics and international Affairs* 405–37 at 409.

⁹ X Dai, above n2 and K Alter, ‘The New Terrain of International Law: Courts, Politics, Rights’ in K Alter (ed.), *The New Terrain of International Law: International Courts in International Politics* (Princeton University Press, 2013).

¹⁰ P Van Den Bossche ‘The Appellate Body of the World Trade Organization’ in the present volume.

¹¹ P Gautier, ‘The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law’ and P Lemmens ‘The Contribution of the European Court of Human Rights to the Rule of Law’, both in the present volume.

¹² S Brammertz, ‘International Criminal Justice and the Rule of Law: the Experience of the ICTY’ in the present volume.

¹³ Ibid.

¹⁴ D Fransen, ‘The Special Tribunal for Lebanon and the Rule of Law’ in the present volume.

II. THE CONTESTED CONCEPT OF THE RULE OF LAW

A central standard of legitimacy is that which is the focus of this volume: the rule of law. The content of this concept is contested, even among the authors represented here. Discussions of the rule of law in domestic settings typically include several norms or values. Thus Lon Fuller listed eight desiderata of the 'inner morality of law', including general applicability, promulgation, non-retroactivity, clarity, consistency, within human capability, stare decisis, and congruence.¹⁵ Lord Bingham offers a somewhat different list, including that the law must apply to all equally, it must be accessible and intelligible, clear and predictable; resolve disputes concerning legal rights and liabilities fairly, according to law rather than discretion, and public officials must act reasonably and subject to law in their exercise of the powers of their offices. Moreover, the law must afford adequate protection to fundamental human rights; and nation states must generally comply with international law.¹⁶ The UN Secretary-General provides yet another list.¹⁷

It is interesting in its own right to address the differences and to what extent there is a common set of norms among such helpful definitions. For our purposes – the legitimacy of ICs – two main issues may suffice: which underlying values might justify such various norms; and which values may merit our attention regardless of whether they are to be included among 'rule of law' values.

I submit that several of the nominated norms – though not all – may be justified on the basis of two interests of individuals: our interest in non-domination and in predictability.

The interest in non-domination is to enjoy 'protection from the arbitrary use of political authority and coercive power',¹⁸ cf 'to protect the individual against arbitrary action.'¹⁹ Such protection is especially important domestically against rulers and governments, as mentioned by several of the present authors, even finding expression in norms requiring 'equality of arms'.²⁰ The same interest also justifies norms that require impartial, rule-guided conflict resolution by peaceful means, to reduce the risk of domination among private actors. For our purposes, ICs may enhance non-domination by guarantees and protections of individuals against infringements by their

¹⁵ L L Fuller, *The Morality of Law* (New Haven, Yale University Press, 1964).

¹⁶ T Bingham, 'The Rule of Law' (2007) *Cambridge Law Journal* 67–85 cf Brammertz, above n12.

¹⁷ Secretary-General, United Nations, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) *UN Doc. S/2004/616* para 6 cf Fransen, above n14.

¹⁸ P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, Clarendon Press, 1997).

¹⁹ P Lemmens, above n11.

²⁰ P Couvreur, 'The International Court of Justice' in the present volume; D Fransen, above n14 cf J Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315–43 at 323.

state.²¹

The second interest concerns our ability to make longer term plans in pursuit of our various interests with some expectation of success – in particular, to be able to rely on general compliance with legal rules.²² This interest supports such norms as legality and non-retroactivity and may justify the use of precedents in some cases – as well as the contribution ICs can play in ensuring implementation by states with their international legal obligations,²³ and in clarifying existing provisions – eg as expressed in DSU Art 3.2.²⁴

A striking divergence of views concerning the concept of the rule of law is how expansive it should be. In particular, does the rule of law require respect for human rights? Divergent views are found even at the United Nations: some statements hold that human rights and the rule of law are *separate* norms:

human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.²⁵

Other statements suggest that respect for human rights is *part of* the rule of law, defined as:

a principle of governance in which all persons, institutions and entities, ..., including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, *and which are consistent with international human rights norms and standards*²⁶ (my emphasis).

I submit that this disagreement, whilst important, need not be settled for our purpose here which is rather to identify which norms – possibly *beyond* the rule of law – are appropriate standards to assess the legitimacy of ICs. Respect for human rights, somehow defined, is included by many authors as such a standard – separate or not from the rule of law.

Let us now bring these standards to bear on the ICs as presented in this volume. The next sections consider two of several concerns which stand out to

²¹ Couvreur, *ibid.*

²² cf J Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law* (Oxford, Oxford University Press, 1979) 210–32.

²³ Couvreur, above n20.

²⁴ Van Den Bossche, above n10.

²⁵ General Assembly of the United Nations. 'Resolution on the Rule of Law at the National and International Levels' (2012) *A/RES/67/97*, cf K Chan and J Wouters, 'Constructing the International Criminal Court's Rule of Law Identity' in the present volume.

²⁶ Secretary General 2004, above n17 at para 6; cited by D Fransen, above n14.

this reader: various forms of fragmentation within and among the ICs which may foster legal uncertainty and responses to such risks; and the risks that ICs themselves may become sources of domination.

III. FRAGMENTATION WITHIN AND AMONG ICS

Concerns about the fragmentation of international law have flourished over the last decade.²⁷ ICs might be suspected of giving rise to at least two forms of worrisome fragmentation, which in turn create risks that they will subject individuals and other actors to domination.

First, several ICs have multiple objectives, which may sometimes conflict. Such a multiplicity requires the judges to exercise more discretion in interpreting the treaty, especially when they are forced to 'balance' partially conflicting objectives – such as human rights courts which must both provide individual justice and specify general human rights standards;²⁸ or the ICC which should hold perpetrators accountable *and* build local judicial capacity *whilst* maintaining rule of law standards.²⁹ Different judges may even reasonably weigh the objectives differently, thus Chan and Wouters note that domestic judges in hybrid tribunals may be more concerned with domestic capacity building than their international colleagues on the bench. With the broader scope of such discretion comes a risk that individuals, private parties and states become subject to the arbitrary will of the judges of ICs. One response is to strengthen procedural requirements of ICs, eg by requiring reasoned opinions and constraints such as precedents. Note, however, that the interpretive practices of different ICs differ, perhaps for good reason. Thus the Appellate Body of the WTO stays closer to the words of the treaty, rather than more (dynamic) interpretations based on the object and purpose of the treaty. This, argues Van den Bossche, helps explain the perceived high legitimacy of the Appellate body. The ECtHR, on the other hand, has a quite different interpretative policy – possibly for good reasons.

Secondly, with more ICs, there is a risk that they will yield conflicting judgments. Their jurisdiction may come to overlap either due to overlooked possibilities when drafting the treaties or as a result of their dynamic interpretation by the ICs themselves. Several authors in this volume note such possibilities,³⁰ but they have strikingly different prognoses. Thus Trindade claims to observe a trend toward harmonization among the ICs:

²⁷ M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' in *International Law Commission, Study Group on Fragmentation* (2006).

²⁸ P Lemmens, above n11.

²⁹ K Chan and J Wouters, above n25.

³⁰ A A C Trindade, 'An Overview of the Contribution of International Tribunals to the rule of law' in the present volume, above n11.

Each international tribunal operates in the ambit of its own jurisdiction, but all undertake in harmony their *common mission* of imparting justice'; '... distinct trends of protection of the human person... converge, rather than conflict with each other, at normative, hermeneutic and operational levels.

While the evidence of such a harmonization is scant, Gautier claims that some fears of fragmentation have been overstated at least with regard to the various courts and tribunals for dispute settlements permitted by the Convention on the Law of the Sea Part XV Art 280.³¹ Judicial practice did not yield such fragmentation.

Various authors in this volume can be read as contributing to a taxonomy of mechanisms which deflect or reduce such risks of fragmentation, and thus bolster predictability and hence the rule of law. We turn to survey such suggestions below, after considering another threat to the rule of law wrought by ICs, due to their many objectives. This raises the risks of domination by these courts themselves.

IV. THE OBJECTIVES OF ICS

The multiplicity of objectives of ICs merits particular attention from the perspective of developing appropriate standards of legitimacy. Many scholars have insisted that the states seldom only intended ICs to resolve disputes but often had further objectives. Whether the ICs contribute toward these intended objectives seems highly relevant for whether they merit deference. Furthermore, other effects of ICs beyond those stated in their treaties affect our assessment of the performance of the ICs. Such functions include, inter alia:

four dimensions of effectiveness that have engendered debates among scholars or received insufficient scrutiny. The first dimension, *case-specific effectiveness*, evaluates whether the litigants to a specific dispute change their behavior following an IC ruling, an issue closely linked to compliance with IC judgments. The second variant, *erga omnes effectiveness*, assesses whether IC decisions have systemic precedential effects that influence the behavior of all states subject to a tribunal's jurisdiction. The third approach, *embeddedness effectiveness*, evaluates the extent to which ICs anchor their judgments in domestic legal orders, enabling national actors to remedy potential treaty violations at home and avoid the need for international litigation. The fourth type, *norm-development effectiveness*, considers how IC decisions contribute to

³¹ United Nations, 'United Nations Convention on the Law of the Sea' (1982).

building a coherent body of international jurisprudence³² (my emphasis).

Karen Alter also argues that ICs perform several roles:

Old-style ICs were primarily inter-state dispute settlement bodies with jurisdiction to adjudicate disputes and access rules that allowed only states to initiate binding litigation. New-style ICs have more extensive mandates that can include jurisdiction to rule on state compliance with international law and jurisdiction to review the legal validity of state and international legislation and administrative acts.³³

Against this backdrop, it is illuminating to consider the wide range of values various compliance communities expect ICs to promote. The broad set of high expectations suggests that many ICs will fail in the eyes of many beholders, at the risk of reducing their perceived legitimacy and hence support among crucial actors. Moreover, the breadth of tasks indicates that we must be wary of generalizing the purposes or goals of ICs, and therefore also wary of recommending general strategies for improving their performance.

ICs discussed in this volume are – with the exception of the international criminal court and tribunals – generally engaged in *dispute resolution*. But many are also expected to engage in several other objectives mentioned by Helfer or Alter – and beyond.

Several ICs engage in – and are even expected to – increase *predictability*, including the predictability of UN organs.³⁴ This is one of the two values underlying rule of law norms. ICs promote this objective in several ways. The judgments and advisory opinions³⁵ of many but not all ICs are expected to establish *precedents*³⁶ and this is especially likely when judgments or awards are made public rather than remain confidential. A further important way that ICs provide more predictability is when they interpret and *clarify* the law, be it the European Convention on Human Rights,³⁷ by the ICTY,³⁸ by defining terrorism,³⁹ or of DSU Art 3.2.⁴⁰ ICs may

³² L Helfer, 'The Effectiveness of International Adjudicators' in K Alter, C Romano and Y Shany (eds), *Oxford Handbook of International Adjudication* (Oxford Oxford University Press, 2013).

³³ Alter, above n9.

³⁴ Trindade, above n30.

³⁵ Ibid.

³⁶ H Van Houtte and B Concolino, 'The Iran-United States Claims Tribunal and its Contribution to International Law' in the present volume.

³⁷ Lemmens, above n11.

³⁸ Brammertz, above n12.

³⁹ Fransen, above n14.

⁴⁰ van den Bossche, above n10.

also contribute by *disseminating* existing rules – such as when the IUSCT was the first to apply the UNCITRAL rules.⁴¹ Often ICs must also engage in law making or *norm development*;⁴² or in *norm specification*, eg when the ICJ must determine which rules of international law apply to delimit the continental shelf.⁴³

A striking aspect of the ICs brought out in this volume is the breadth of objectives they pursue, both as a whole and by individual ICs. The objectives range from those of mutual material interest, such as those regulating trade⁴⁴ to others that are mainly ‘other regarding’ – ie aimed at the protection of the interests of non-citizens. The latter include cases where the Rome Statute requires *every* state to hold those engaged in international crimes responsible, and the creation of the special tribunal for Lebanon.⁴⁵

An important general tendency among ICs is that many of them have several, often conflicting, objectives. Thus the ECtHR must both provide individual relief *and* set general human rights standards.⁴⁶ The Court of Justice of the EU must both incorporate international law and ensure compliance with fundamental rights – leading to conflicts such as *Kadi*.⁴⁷ Several of the ICs must generally balance rule of law standards with considerations of practicality and political realism.⁴⁸

Indeed, some ICs have a perplexing number of objectives: the ICTY’s task is to *reassert* the rule of law, to redress crimes, and even to halt them – and to contribute to local capacity building – and to restore and maintain peace.⁴⁹ No wonder that some of these ICs are criticized as ineffective: there are clearly intractable tensions between ensuring retributive and restorative justice in addition to forward-looking objectives of rule of law promotion.

With the plethora of objectives come several challenges we still have not addressed properly. One set of issues concern the mandates and structures of ICs required to manage such goal conflicts in constructive and responsible ways, eg by exemption clauses or priority rules. Another set of issues relate to how the judges and arbitrators should exercise their discretion responsibly when pursuing such baskets of objectives, eg when selecting some cases – and not others – in order to guide the resolution of yet other

⁴¹ Van Houtte and Concolino, above n26.

⁴² Trindade, above n30 and Lemmens, above n28.

⁴³ Gautier, above n11.

⁴⁴ van den Bossche, above n10.

⁴⁵ Fransen, above n14.

⁴⁶ Lemmens, above n11.

⁴⁷ K Lenaerts, ‘The Court of Justice as the guarantor of the rule of law within the European Union’ in the present volume.

⁴⁸ Brammertz, above n12.

⁴⁹ *Ibid.*

cases.⁵⁰ Chan and Wouters point to a third set of issues in the intersection between the institutional and the professional: in hybrid courts, we should expect that domestic and international judges are likely to give higher priorities to the varying objectives – eg to domestic capacity building rather than combating impunity – how should such hybrid courts be composed, and how should they operate?

One implication of this multiplicity of objectives is that the ICs must enjoy wide discretion in ‘balancing’ the various values and aims. Thus certainty and consistency becomes more difficult with multiple objectives for any single IC or several ICs.⁵¹ Indeed, with wide discretion comes the risk of abuse of such authority and hence a concern that the ICs may become new sources of domination. Thus, the fragmentation and multiplicity of objectives of ICs are profound challenges to the rule of law. There are at least two aspects of ICs that may still reduce such risks. The ICs are not unchecked powers: to the contrary, their impact is typically indirect, in complex modes of interaction with domestic authorities as well as other international bodies. Secondly, there are several features which reduce the scope of unchecked – ie arbitrary – discretion by the ICs.

V. THE INTERACTION BETWEEN ICS AND DOMESTIC AUTHORITIES

An important point to consider when understanding and assessing the roles and risks of ICs is how different ICs interact with domestic judiciaries and other authorities in a complex multilevel legal and political order. There are several ways of dividing the labour between ICs and domestic authorities, many guided albeit vaguely by some conception of subsidiarity. These serve to reduce the risk of domination by the ICs – but possibly at the cost of increasing the risk of domination by domestic authorities.

The IC may serve as the court of last resort if domestic courts *cannot* resolve the issues. Thus, the WTO is regarded as a last resort and prefers parties to settle without adjudication⁵² – though even then agreements will occur ‘in the shadow’ of the WTO bodies. Likewise, the rules of composition to the Iran-United States Claims Tribunal illustrate how carefully states seek to maintain sufficient loyalty while ensuring sufficient independence from each party.⁵³

Alternatively, ICs should intervene only when domestic courts *will not* do so, raising important challenges to develop trigger criteria.⁵⁴

⁵⁰ Van Houtte and Concolino, above n36.

⁵¹ Chan and Wouters, above n25.

⁵² van den Bossche, above n10.

⁵³ Van Houtte and Concolino, above n36.

⁵⁴ Chan and Wouters, above n25.

The task of the IC may also be ‘positive complementarity’: to enhance or empower the domestic judiciary or the democratically accountable bodies, as the ICTY and the ECtHR should.

The IC’s authority may also be limited as regards how specific its judgment should be, again possibly by appeals to subsidiarity. Thus ITLOS specifies damages in detail⁵⁵ while the ECtHR often leaves it to the domestic authorities to decide how to best avoid future violations.⁵⁶

Several contributions illustrate how the relationship between domestic authorities and ICs is dynamic. The ad hoc criminal tribunals’ failure in building local capacity led to the establishment of hybrid criminal tribunals.⁵⁷ Likewise, Van den Bossche’s account of the WTO Appellate body underscores that states learned from GATT that they needed to relinquish somewhat more veto power so as to render WTO settlements compulsory, and to allow the conclusions of the IC to become legally binding even against opposition by some states. Furthermore, the Appellate body has been very cautious in its interpretation, resulting in broad support. However, once established, judicial activism might increase.

The appeals to subsidiarity thus do not settle once and for all how authority should be allocated and used between the states and the ICs. Indeed, several of the ICs canvassed in this volume point to another ambiguity in appeals to subsidiarity: Who are the ultimate units of concern? Much international law has assumed ‘state-centric’ conceptions of subsidiarity.⁵⁸ However, several historical traditions of subsidiarity – from which international law has borrowed the term – are person-centred: it is the interests of individuals, not of states, which should determine where to allocate authority. These two different vantage points have interestingly different implications for some ICs, for instance as regards the role of international human rights courts. Interestingly, the presentation of the WTO Appellate body suggests that it is companies or industries rather than states who push to develop this IC. In some such cases, it may appear that it is the perceived interests of corporations, rather than of states, which explain – if not justifies – the relationship between domestic authorities and ICs. One preliminary conclusion is that appeals to subsidiarity may not so much lay these important issues to rest, but rather stimulate more structured and systematic arguments concerning the legitimacy of ICs.

⁵⁵ P Gautier, above n11.

⁵⁶ P Lemmens, above n11.

⁵⁷ K Chan and J Wouters, above n25.

⁵⁸ A Follesdal, above n1.

VI. REDUCING RISKS OF FRAGMENTATION AND ARBITRARY DISCRETION

We finally consider ways to reduce fragmentation among ICs and reduce the risk that they will abuse their discretion. First, there are several modes of ‘jurisprudential cross-fertilization’. Several authors point out that endeavours of coordination already exist,⁵⁹ but these are insufficient – and some create risks of their own.

- *Judicial dialogues* among the tribunals in the form of meetings do occur and should perhaps be institutionalised,⁶⁰ thus argues Slaughter.⁶¹
- ICs’ *advisory opinions* reduce the risk of conflicting judgements.⁶²
- ICs already borrow interpretations of concepts, such as ‘joint criminal enterprise’ or redefining crimes against humanity or terrorism to include gender based violence as laid out by the ICTY has ‘migrated’ to other international and hybrid courts and tribunals.⁶³

One of the problems of these practices is that they do not reduce the risk of domination *by* the ICs. To the contrary: some may fear that such networks of international judges and arbitrators increase their influence at the cost of other public authorities and individuals – thus detrimental to democratically accountable modes of governance.

A second way to reduce fragmentation, which can also reduce the scope of discretion judges enjoy, could be to establish principles for settling precisely such uncertainties.⁶⁴ Chan and Wouters do not provide examples, but three illustrations of ways to channel or guide the judges of ICs might be in order: Some might argue that international human rights treaties should override other treaty obligations in times of conflict to increase predictability and perhaps normative legitimacy. There is no evidence of such a primacy of human rights currently,⁶⁵ but the point is here rather that this may be a defensible objective, and possibly a standard of legitimacy for the set of ICs as a whole. A second example is drawn from GATT, which includes exemption clauses (art XX) that permit regulations of trade to protect public morals or human health. Such exemptions could be laid out in a wide range of treaties, and include, *inter alia*, certain human rights norms or other international

⁵⁹ Trindade, above n30.

⁶⁰ *Ibid.*

⁶¹ A M Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004).

⁶² Trindade, above n30 and Couvreur, above n20.

⁶³ Brammertz, above n12.

⁶⁴ Chan and Wouters, above n25.

⁶⁵ J Vidmar, ‘Norm Conflict and Hierarchy in International Law: Towards a Vertical International Legal System?’ in E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford, Oxford University Press, 2012) 13.

norms of high priority.⁶⁶ A third strategy could be to require that ICs may not interpret their treaties as 'self-contained', but instead require them to engage in systematic interpretation – in particular human rights treaties or environmental treaties.⁶⁷

VII. CONCLUSION

The above philosophical reflections have drawn on the learned preceding chapters to indicate some general lessons concerning the legitimacy of ICs. They have focussed largely on the contributions by ICs to rule of law standards – but also threats wrought by ICs to these very same values: of non-domination and stable legitimate expectations. Fragmentation within and among ICs, and their multiple objectives, require that the judges and arbitrators enjoy a wide berth of discretion in interpretation and adjudication – which raises the risk that states and individuals become subject to domination by the ICs themselves. The contributions in this volume have indicated several responses worth pursuing further to alleviate these fears. The complex, differing and dynamic relationships between ICs and domestic and other international authorities may help blunt risks of abuse of their power – at the cost of less effective ICs. Finally, several authors have pointed to ways to check and guide the discretion of the ICs to reduce the risks of fragmentation and domination. Such checks, guides and coordination among bodies in complex interdependence are typical contributions from a constitution which considers the complex, interdependent set of institutions as a whole. A conclusion to be drawn from the insights in previous chapters is thus that increased legitimacy of international courts requires perspectives and measures of constitutionalisation: Promote rule of law standards by better checks on the international courts, and channel and coordinate them better. If we want other actors to regard the judgments of ICs as reasons for action, these two paths of exploration seem worthwhile starting points.

⁶⁶ M Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' (2008) 33 *The Yale Journal of International Law* 215–51; M J Trebilcock and R L Howse, 'Trade Policy and Labour Standards' (2005) 14 *Minnesota Journal of Global Trade* 261.

⁶⁷ S H Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility' (2002) *Journal of International Economic Law* 5; J Dine, *Companies, International Trade and Human Rights* (Cambridge, Cambridge University Press, 2005); H Keller, 'Codes of Conduct and Their Implementation' in R Wolfrum and V Roben (eds), *Legitimacy in International Law* (Heidelberg, Springer, 2008) 219–98; cf N Lavranos, 'Towards a "Solange"-Method between International Courts and Tribunals?' in Y Shany and T Broude (eds), *The Shifting Allocation of Authority in International Law* (Oxford, Hart Publishing, 2008).